Asplundh Tree Expert Company *and* Dennis A. Brinson. Case 9–CA–36005

November 30, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On September 22, 1999, Administrative Law Judge Richard H. Beddow, Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.[1]

The judge found that the Respondent violated Section 8(a)(1) of the Act by threatening to lay off Dennis Brinson, and by discharging Brinson and Eric Crabtree, because they concertedly complained about working conditions and briefly withheld their services in support of their complaints while they were on a temporary work assignment in Canada. The Respondent has excepted to the judge's finding that it is appropriate for the Board to assert jurisdiction in this matter and to his findings that it violated the Act. We find no merit in the exceptions.

The pertinent facts are set forth in the judge's decision.[2] In brief, they are as follows. The Respondent provides a tree trimming service in the eastern United States. One of its operations is based in Cincinnati, Ohio, where it performs line clearance work for Cincinnati Gas & Electric Company. Its employees who are engaged in that work are represented by IBEW Local 71.

In January 1998, the Respondent sent 20 employees, including Brinson and Crabtree, and their equipment to Ottawa, Canada, for about 2 weeks, to help that city clean up after a major ice storm. While working in Canada, the employees were given a $25 (U.S.) per diem to pay for food; their hotel rooms were paid for by the Respondent. On the way from Cincinnati to Ottawa, some of the employees had problems with malfunctioning taillights and heaters on their trucks. While in Canada, some of the employees claimed that the cost of food was higher than they expected. They also learned that, although the Respondent was prepared to pay as much as $75 a night for each two-man hotel room, their rooms actually cost only $55 (Canadian; plus tax). Some employees wondered why they could not receive some of the Respondent's savings on hotel accommodations to help defray the cost of food.

A group of the employees selected Brinson to act as their spokesman and voice their concerns about their per diems and the condition of their trucks to their general foreman in Ottawa, Ronald Lacy. Brinson did so early on Saturday morning, January 17. Lacy then telephoned Supervisor Darrell Lewis in Cincinnati and told him of the employees' concerns over the use of the hotel room savings. Lewis responded that if the employees were not going to work, they would be considered to have quit. Lewis later spoke to Brinson and, as the judge found, threatened him with layoff or discharge.[3] After Brinson and Lewis finished their conversation, the other employees went to work as scheduled. Lacy approached Brinson and Crabtree and asked them what they were going to do. The two employees testified that they replied that they still wanted to talk about the situation; Lacy then told them to give him their (truck) keys, which meant that he considered them to have quit.[4] Brinson and Crabtree had to make their own arrangements for returning to Cincinnati. After he returned to Cincinnati, Brinson sought, without success, to be reinstated.

1. The Respondent contends that the Board lacks jurisdiction over the unfair labor practices alleged here because the events that gave rise to this case took place in Canada.[5] The judge rejected that contention. He

[1] We shall substitute the Board's standard language for certain portions of the judge's recommended Order and notice.

[2] The Respondent relies in part on testimony that the judge either did not discuss or did not explicitly discredit. As we discuss below, however, we find that, even under the Respondent's view of the testimony, the judge's ultimate findings are correct.

[3] Brinson testified that Lewis castigated the men as crybabies who were making the Company look bad, and that he (Lewis) knew of about 20 crews that would possibly be laid off when the men returned from Canada. Lewis testified that he told Brinson that Brinson was making his job easier, because he had to lay off 50 employees and if Brinson quit, that was just 1 more man Lewis didn't have to worry about laying off. The judge did not specifically credit either version of Lewis' statement. Clearly, however, either version constituted an unlawful threat to lay off any employee who joined the protest over working conditions.

[4] Lacy testified that, when Brinson and Crabtree refused to take their trucks out, he told them that they had quit. Under either version of the testimony, the two employees at least temporarily withheld their services on January 17, and Lacy deemed their actions to constitute quitting.

[5] As the Board has recognized, the Supreme Court has ruled that the Act does not apply abroad. *Computer Sciences Raytheon*, 318 NLRB 966, 968 (1995), citing *EEOC v. Arabian American Oil Co. (Aramco)*, 499 U.S. 244 (1991), and *McCullough v. Sociedad Nacional*, 372 U.S. 10 (1963). Accordingly, the Board has declined to assert jurisdiction

reasoned that Brinson and Crabtree were Americans living in the United States, whose regular work was performed in the United States for the Cincinnati branch of an American company, and whose conduct consisted of protesting working conditions on a brief, temporary job in Canada. He noted that both the threat to Brinson and the instruction to Lacy to (in effect) terminate anyone withholding his services originated with Lewis in Cincinnati, and that Brinson was denied reinstatement after he returned to the United States. The judge further found that the main effect of the Respondent's actions (the loss by Brinson and Crabtree of their jobs in the United States) was not extraterritorial, that the Board's assertion of jurisdiction would not interfere with Canadian law or affect the employment conditions of Canadian employees, and that a remedial order would have no demonstrable extraterritorial effect. He therefore found it appropriate for the Board to assert jurisdiction.

We agree with the judge for the reasons stated in his decision. This case involves an employment relationship that has been shown to be entirely within the territorial boundaries of the United States. Brinson and Crabtree are Americans who were employed by an American employer in the United States and who performed their regular work in the United States. Their assignment in Canada was both brief and temporary. While in Canada they were supervised by an American supervisor. Moreover, the results of the Respondent's conduct were principally felt in the United States. Thus, the Respondent did not simply replace Brinson and Crabtree on their Canadian assignment, but instead, as the judge found, effectively fired them from their jobs in the United States.

Also, as the judge found, our assertion of jurisdiction will not interfere with Canadian law or affect the terms and conditions of employment of Canadian employees.[6] Our Order will affect only the American operations of an American employer. Thus, on this record, there is no danger that our assertion of jurisdiction will lead to a conflict between the laws of the United States and Canada or otherwise interfere with foreign relations.

Finally, failure to assert jurisdiction would undermine the Act's policy of protecting the right of employees to engage in concerted activity designed to affect their terms and conditions of employment. Brinson and Crabtree were discharged from their jobs in the United States for engaging in conduct that clearly would have been protected if it had taken place in the United States. We reject the Respondent's contention that the employees' actions were not protected because they were directed solely toward affecting terms and conditions of employment in Canada.[7] Although the Act does not protect Americans who are permanently employed outside of the United States, even by American firms,[8] Americans whose permanent employment relationships are with American firms in the United States do not lose the protection of the Act while on temporary assignment outside of this country, particularly where extending the Act's protections would not interfere with the laws of another nation.[9] As we have found, no circumstances here implicate the concerns associated with extraterritorial application of domestic law. In contrast, we think that it would frustrate the purposes of the Act were we to decline jurisdiction and deny Brinson and Crabtree relief for the Respondent's unlawful conduct.

2. We also agree with the judge, for the reasons set forth in his decision, that Brinson and Crabtree were engaged in protected concerted activities and that the Respondent violated Section 8(a)(1) by threatening Brinson with layoff and by discharging Brinson and Crabtree for engaging in those activities. In its exceptions, however, the Respondent contends that the cost of the hotel rooms was not a term or condition of employment, and therefore that Brinson and Crabtree were not engaged in protected activities when they attempted to negotiate with Lacy over giving part of the savings on hotel rooms to employees for additional meal money. The Respondent also cites testimony from several witnesses to the effect that Brinson accused Lacy of "pocketing" the difference between what the Respondent had been prepared to pay and what it actually paid for the hotel rooms, and that Brinson attempted to persuade the other employees to engage in a "wildcat strike." It argues that, by engaging in such conduct, Brinson lost the protection of the Act.

There is no merit in any of those contentions. The employees were seeking a higher per diem rate for

over American citizens who were permanently employed by American employers outside of the United States. See, e.g., *Computer Sciences Raytheon*.

[6] The Respondent has excepted to this finding, but does not contend that the judge's finding is factually inaccurate.

[7] We agree with the Respondent that when Brinson and Crabtree withheld their services on January 17, they did so only over the question of whether the employees should receive a portion of the money earmarked for hotel rooms.

[8] *Computer Sciences Raytheon,* supra.

[9] The Supreme Court in *Aramco* held that Title VII of the Civil Rights Act of 1964, 42 U.S.C §. 2000e et seq., did not apply extraterritorially. 499 U.S. at 259. (That holding was overruled by statute in 1991, Pub. L. 102–166.) The employee in *Aramco*, however, was an American *permanently* employed abroad by an American employer. *Aramco* does not address a case in which an employee is given a transitory assignment in another country with the clear expectation of returning to a regular job in the United States.

expenses. This subject is clearly a term or condition of employment. Although the employees suggested that the increased payment could be funded by hotel cost savings, this does not make their concern (low per diem rate) any less a term or condition of employment.[10]

We also reject the Respondent's contention that the employees lost the protection of the Act because Brinson (allegedly) accused Lacy of "pocketing" the savings from the hotel rooms and called for a wildcat strike. Brinson denied making either statement.[11] But even if he did both, his conduct was still protected. An accusation that Lacy was "pocketing" the money, made in the context of a discussion of an employment term, would be protected unless it was so "offensive, defamatory or opprobrious" as to remove it from the protection of the Act.[12] A statement that is alleged to be defamatory will not lose its protection unless it was made either with knowledge of its falsity, or with reckless disregard for whether it was true or false.[13] There is no indication in the record that Brinson's assertion was characterized by either of those conditions.

We also agree with the judge that Brinson and Crabtree did not lose the protection of the Act simply because they protested to Lacy directly and not through the Union and (allegedly) sought to persuade other employees to do the same. As the judge found, the collective-bargaining agreement's coverage was limited to work on the property of Cincinnati Gas & Electric Company, and therefore the Union has not been shown to be the employee's exclusive representative for purposes of employment on the job in Ottawa.[14] In any event, there is no evidence that Brinson and Crabtree were attempting to circumvent the Union, especially given that the actions triggering their discharges took place early on a Saturday morning, hundreds of miles from Cincinnati.[15]

[10] According to the credited testimony, Brinson brought to Lacy's attention the employees' concerns over truck lights and heaters in addition to their complaints regarding the savings on the hotel rooms. The Respondent argues that Brinson and Lacy discussed only the latter issue on January 17. Even if the Respondent were correct, however, Brinson and Crabtree's attempts to settle that issue were protected, as we have discussed above.

[11] The judge did not explicitly resolve the testimonial discrepancies concerning those issues.

[12] *KBO, Inc.*, 315 NLRB 570, 570 (1994); *Mediplex of Wethersfield*, 320 NLRB 510, 513 (1995).

[13] *KBO, Inc.*, 315 NLRB at 570; *Mediplex of Wethersfield*, 320 NLRB at 513.

[14] For the same reason, the contract's no-strike clause has not been shown to apply to the Ottawa job.

[15] As the judge found, the Union later declined to act on behalf of the discharged employees.

ORDER

The National Labor Relations Board orders that the Respondent, Asplundh Tree Expert Company, Cincinnati, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with layoff because they concertedly complain about working conditions.

(b) Terminating any employee for engaging in concerted activities protected by Section 7 of the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Dennis A. Brinson and Eric Crabtree full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Dennis A. Brinson and Eric Crabtree whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Cincinnati, Ohio facility copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 17, 1998.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 30, 2001

Peter J. Hurtgen, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To act together for other mutual aid or protection

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten employees with layoff because they concertedly complain about working conditions.

WE WILL NOT terminate any employee for engaging in concerted activities protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Dennis A. Brinson and Eric Crabtree full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Brinson and Crabtree whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Brinson and Crabtree, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

ASPLUNDH TREE EXPERT COMPANY

James E. Horner, Esq., for the General Counsel.
Steven Semler, Esq., of Washington, D.C., for the Respondent.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW, JR., Administrative Law Judge. This matter was heard in Cincinnati, Ohio, on June 3 and 4, 1999. Subsequent to an extension in the filing date, briefs were filed by the General Counsel and the Respondent. The proceeding is based on a charge filed May 29, 1998,[1] by Dennis A. Brinson, an individual. The Regional Director's complaint dated January 22, 1999, alleges that the Respondent, Asplundh Tree Expert Company, of Cincinnati, Ohio, violated Section 8(a)(1) of the National Labor Relations Act by threatening employee Dennis Brinson with layoff because Brinson had complained about Respondent's wages and working conditions on behalf of other employees and discharging employees Dennis Brinson and Eric Crabtree because of their concerted protected activities.

On review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is engaged in the tree trimming business in the eastern United States. It annually performs services in States other than Ohio valued in excess of $50,000. It admits that at all times material is and has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act. It contends, however, that the Board lacks statutory jurisdiction over the acts alleged in the

[1] All following dates will be in 1998 unless otherwise indicated.

complaint because they assertedly took place outside the United States.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Respondent maintains a branch office and a regular group of approximately 50 crews serving the greater Cincinnati area. Its primary customers are electric utility companies which need their electric transmission lines cleared of tree limbs and it has a collective-bargaining agreement with Local Union No. 71, International Brotherhood of Electrical Workers of Columbus, Ohio, which covers work done on behalf of the Cincinnati Gas and Electric Company. It also does other work, including scheduled out-of-town work in other States and "emergency" work to assist other utilities or entities affected by ice storms or other natural disasters. After a major ice storm hit parts of Canada and New England in early January 1998, the Respondent obtained contracts to perform tree cleanup work in Canada at several separate locations.

Employees are not required to go to out of area storm work but volunteer for such work under generally established practices which include driving straight through to the storm location, a pay rate based on their home collective-bargaining agreement or the storm's locale's rate, whichever is higher, a $25-a-day per diem food rate (or a direct expense paid agreement with a customer), and provision and payment of motel cost by the employer.

The Respondent's storm center in Pennsylvania sent over 100 crews from various locations to Canada. General Foreman Roland Bennett headed a crew from Cincinnati that were sent on January 11 for 2 weeks to Quebec where they worked on clearing power lines under an emergency contract with a utility company, which furnished all lodging and subsistence. On their first day in Quebec the crews engaged in a brief, 1-hour work stoppage to clarify their pay rate but the situation was clarified and resolved after phone calls to Cincinnati by Bennett. No action was taken by the Respondent against any employees, however, some Quebec employees subsequently communicated with employees on the Respondent's job in Ottawa.

The Ottawa job was bid on a dollar amount per crew hour for generally, nonemergency city cleanup work and employee costs were paid by the Respondent. The Company supplied 10, two person crews under the supervision of General Foreman Ronald Lacy and they left on Tuesday, January 13. Twenty-four employees showed up but two crews of volunteers were not accepted. Not everyone remembered all of what was said but crews were told in advance of leaving that the work would be in Ottawa for about 2 weeks and that the Company would give them $25 a day per diem for food and provide and pay for motel accommodations at company expense and they would be driving straight through the night to Canada. Some employees understood Supervisor Darrell Lewis to have said they would get $75 a night for motel expenses, however, Lewis credibly testified that he told them that the Company could afford to pay up to $75 a day for their rooms.

Their departure was delayed until 4 p.m. when they were told to follow Foreman Ron Lacy (no maps or other instructions were provided). The company trucks had (speed) governors and several drivers had trouble keeping up with Lacy. Near Detroit, the heater in the truck driven by employee Eric Crabtree stopped working. At the first fuel stop near Detroit, Crabtree told Lacy who said to keep driving and when it became daylight, he would fix it. When Crabtree again complained at daylight, Lacy's said to wait until the crew arrived in Ottawa. There were also taillight problems with three trucks, which Lacy did fix. At one point in Canada, Lacy stopped at a truck stop for a 2- or 3-hour rest period before moving on to Ottawa but employees got little rest because of the cold. Employee Ron Noble, who rode in the truck driven by Brinson, testified that at the first stop for fuel, he asked Lacy for food money. Lacy replied that Noble had not been working long enough to receive any money.

On arrival in the Ottawa area several trucks became separated from Lacy after he took an incorrect exit ramp. Brinson called Cincinnati and they subsequently were seen by the foreman from another region and were escorted to their motel about 11 p.m., 31 hours after their departure. Employee Shane Duff recalled that by the time they arrived at the hotel, it was below zero, the window was fogged up, and they had no heat. As a result of the troubled trip the men began complaining among themselves about their situation.

After arriving, some employees learned that instead of being given $75 per night for the hotel, that Lacy paid for the hotel for everyone, at a cost below the $75 per night they had been told was available. Some employees grumbling that they could use the difference in the cost of the hotel to help them pay for the high cost of Canadian food. Brinson said, "we was all standing in the hallway where our rooms were at, everybody was complaining about things and they was all wanting to go down and talk to Ron. I told them, 'well, we'd be better off if we just had one person to do all the talking, instead of everybody going down there and hounding him on it,'and they more or less agreed to appoint me as their spokesperson." Duff, testified that "all the workers stood around and engineered the agreement and had Mr. Brinson be our spokesperson" and Noble recalled that Brinson, "was the one that was speaking up the most . . . and the one that was seen like he could put it best to Mr. Lacy."

The crews left for their first day of work (without breakfast) at 6:30 a.m. Thursday and get back about 12 hours later when more groups complaining occurred. Meanwhile, Shane Duff phoned his brother who was on Foreman Gilbert's job in Quebec. Brinson was put on the line and they compared situations. Duff testified that on Friday night, the men gathered in the hotel lobby and, "Everybody had got together with Mr. Brinson and he was supposed to have been the spokesperson to confront Ron Lacy." Brinson testified that he spoke with Lacy and that Lacy called Cincinnati and put him on the phone with Supervisor Lewis. He first thought that this occurred on Friday, however, it appears from the overall record that it occurred Saturday morning, January 17.

Lacy testified that Brinson phoned him at his hotel room on Saturday morning before they left for work, and that Brinson told him that, "They got a problem, that they wanted their extra money" referring to the difference between the room cost and $75. Lacy claimed that he would agree to give the men the

difference in what they were told they would get (the $75) and what Respondent actually paid for the room—if that was approved by Darrell Lewis. Then, in the motel lobby Brinson, spoke with Lacy about several problems including truck heaters and lights and, Duff credibly testified that Brinson said, "we can't work without our lights and heaters being fixed."

Lacy recalled that he phoned Lewis at about 6 a.m. Saturday and explained to Lewis what Brinson had asked. Lewis told Lacy that Respondent was not about to give in to Brinson's request and that "if they're not going to work, they're going home." Lewis testified that he instructed Lacy on the phone not to give Crabtree and Brinson the money but, "to talk to them and we needed to go to work. Other than that, I couldn't make them go out. If they quit, they quit." Lewis also said that he told Lacy that, "if they refuse to go to work, they would've quit." Lacy testified that Lewis told him that, "if they're not going to take the trucks out, that means they quit."

While Brinson and Lacy were still in the hotel lobby, Lacy phoned Lewis again. According to Lewis, he received the second phone call about 15 minutes later, and Lacy told Lewis that Brinson wanted to talk to him. Lewis said he told Brinson that, "It didn't make any difference to him what the rooms cost. Just to go to work."

Brinson testified that after Lacy telephoned Lewis, Lacy handed him the phone and Lewis did all the talking telling Brinson that we was acting like a bunch of little whiny cry babies, and was making the Company look bad and that "He was tired of people telling him where he was going to work. Lewis then said that when the men got home from Canada, "he knew of 20 crews that was possibly going to get laid off." Lewis testified that he told Brinson in that phone call, "I made the remark that he [Brinson] was basically making my job easier, cause I'm looking to lay off 50 guys. And if he quit, then that's just another guy I didn't have to worry about laying off." Brinson then told other employees what Lewis said and added that "It's up to you, you know what you guys want to do." The men walked around a corner of the hotel. Brinson waited awhile but then he realized that most of the men were not returning and looked "around the corner just to see that the guys were getting on the shuttle bus to go to work" and was surprised by the lack of support.

Lacy approached Brinson, who was standing with Eric Crabtree, Shane Duff, and Ron Noble and asked 'What are you going to do?" Brinson replied that he would still like to talk about it and he testified that Lacy only response was "Give me your keys" and Brinson did so. Lacy asked Crabtree, "Well, what are you going to do?" and Crabtree replied, "I'm with Dennis. I still think we need to have something done about this" and Lacy replied, "give me the keys." Duff recalled that after the two men handed in the keys to their trucks, Lacy told them, "Get home the best way you fucking can." Noble recalled that at that point, "Me and Shane were undecided because we said we would stick with Denny" but Brinson told Noble and Duff to go on to work, that Brinson did not want them to get fired too.

Brinson then became visibly upset, cried, and threw down his thermos bottle of coffee on the floor.

Lacy testified that he asked Brinson:

> if he was going to go to work, take the truck out and he told me no and I said, you know this means you quit. And he goes, I've got to do what I've got to do, and he give me the keys.

and that he asked Crabtree:

> Eric, are you going to take your truck out, and he told me no, I've got to stick with Dennis.
>
> He handed me his keys and I told them, I said, you guys knows this means you quit.

Lacy then said there was nothing else he could do and that they were on their own. He thereafter called Lewis who told him that a replacement crew would be there the next day (a crew was dispatched Saturday at noon).

That Saturday night Brinson phoned Lacy. Lacy testified that Brinson asked if he still had my job and that he said no, you quit and that Brinson replied, "no, I just took the day off."[2] Brinson then brought gas receipts to Lacy, and told Lacy he was keeping the unreturned part of his per diem for motel costs, offering to have it deducted from his final paycheck, which deduction Lacy never made. Brinson also asked Lacy for a payroll advance in order to get home but the request was denied. Brinson and Crabtree made they way back to Ohio by bus.

Noble testified that during the day Lacy told Duff and himself that if he found Brinson and Crabtree still in their hotel rooms when he returned that Saturday night, he would call the cops and have then removed from the premises. They went to the Brinson room and warned them. The two then made arrangements for a new hotel room and moved.

Discussion

Jurisdiction

The General Counsel argues that the decision to discharge Brinson and Crabtree was made in Ohio, that their presence in Canada was very brief and temporary and that under the circumstances, the Act should be given extraterritorial application relying primarily on the Board's decision in *Longshoreman ILA (Coastal Stevedoring Co.),* 313 NLRB 412, 417 (1993), where the alleged conduct was not wholly extraterritorial and *Freeport Transport, Inc.*, 220 NLRB 833, 834 (1975), where the Board exercised jurisdiction based on the showing of a "sufficient" American connection, where an American working out of a Canadian truck terminal driving to and from the United States, allegedly was discharged for his activity in Canada.

Here, Brinson and Crabtree were Americans who regular work was performed in the United States where they were hired and where they reside, for the Cincinnati branch of an American company. They concertedly protested over the working conditions they encountered during transit between Cincinnati and Ottawa, Canada, and during their first few days on a temporary, 2-week assignment in Canada. As found

[2] On rebuttal Brinson and Crabtree both testified that Brinson did not make any statement about "taking the day off" and I find that their collective recall is more believable than Lacy's as to this event.

below, Brinson directly (and others implicitly), also were threatened with layoff of loss of their regular jobs when they returned to the United States on the phone by a supervisor in the United States.

The record is silent as to Crabtree's actions after he returned to the United States, however, Respondent's Exhibit 1, Brinson's letter to the Respondent's president (sent February 20, 1998), included the statement that "since I've been home, I have called Asplundh trying to get my job back, to no avail."

The Respondent attempts to minimize the nature of the dispute by reducing it to only a question of the motel cost in Canada. Clearly, the employees, and specifically Brinson, addressed a range of working conditions both in transit and on site in Canada with foreman Lacy. Otherwise Brinson attempted to speak to supervisor Lewis, but it appears that Lewis controlled the conversation and affirmatively prevented Brinson from communicating the group's concerns, thus the Respondent cannot claim that it was unaware of the extent and concerted nature of the employees' concerns, see *Eaton Warehousing Co.,* 297 NLRB 958, 962 (1990).

Otherwise, the Respondent contends that the Act has no application to U.S. citizens working outside the territorial United States and that the Board lacks any jurisdiction over this case, citing *EEOC v. Arabian American Coal Co.,* 499 U.S. 244 (1991) a decision involving Title VII of the Civil Rights Act of 1964, the jurisdictional provisions of which are essentially the same as the NLRA's. It argues that this result rest on giving effect to a strong "presumption against extraterritorial applications" of U.S. statutes "to protect against unintended clashes between our laws and those of other nations, which could result in international discord." Paridoxily, it points out that "in Canada the law protects the right to strike even for activity which is unprotected under U.S. law citing *McGavin Toastmaster v. Ainscough,* 1 S.C.R. 718 (Canada, 1975).

In *Coastal Stevedoring*, supra, the Board considered the Supreme Court's *Arabian American Oil* holding and went on to note limitations on the restrictions of the latter case as applied by the circuit court in *Dowd v. Longshoreman ILA*, 975 F.2d 779 (11th Cir. 1992), where the court then determined that several factors in the case support the assertion of jurisdiction:

> (1) the NLRA is here applied, as Congress intended, to protect persons in commerce from a secondary boycott, (2) the conduct was intended and had the effect of creating an unlawful secondary boycott in the United States, (3) certain significant conduct in furtherance of the secondary boycott occurred within the geographic territory of the United States, and (4) the fact that the Board is acting against a domestic labor organization subject to regulation under the NLRA.

The court concluded that the threats made by the Japanese Unions were within the scope of the Act:

> Although the Supreme Court has limited the scope of the NLRA to avoid interference with the internal affairs of other nations, the Act is properly applied to the conduct of a domestic labor union which solicits a foreign union to apply pressure overseas with the intent and result of creating a secondary boycott in the United States. Further, the conduct charge in the Board's petition is not wholly extraterritorial; the letters requesting and ratifying the boycott threatened by the Japanese Unions were sent from the United States. Under these circumstances, nothing in the text or intent of the NLRA compels us to allow ILA to evade responsibility for effecting a successful secondary boycott in violation of the NLRA.

Here, a review of the circumstances leads to a conclusion that assertion of jurisdiction will not interfere with the laws of or affect the employment conditions of Canadian employees.

When two or more employees jointly participate in withholding their services for the purpose of pressuring their employer into resolving to their satisfaction grievances over their rates of pay, or working conditions, they engage in "concerted activities" for the purpose of collective bargaining or other mutual aid or protection" within the meaning of Section 7 of the Act, and it is a violation of the Act for their employer to discharge, suspend, or otherwise interfere with, restrain, or coerce them for engaging in such activity. See *San Diego County Assn.,* 259 NLRB 1044, 1048 (1982), and cases cited therein. The fact that the majority of the group relented and went to work does not alter the situation for Brinson and Crabtree who held to their intention to get some resolution to their demands. Moreover, contrary to the Respondent's argument on brief, Foreman Lacy was aware that the employee demands went well beyond the sharing of motel money and, otherwise, supervisor Lewis rejected Brinson's attempt to communicate other concern at Respondent's perial, see *Eaton Warehousing*, supra.

It appears that the decision to treat the protestors as having quit if they do not go to the job site was made in Cincinnati by Lewis and relay to the employees by Lacy. Moreover, this was accompanied by a directly communicate threat from Lewis to Brinson that upon their return, protestors likely would be selected for layoff at their regular Cincinnati jobs. This threat clearly was a violation of the Act and it specifically conveyed the fact that implementation of layoff would occur at their regular job location in the United States and it was communicated by phone from a location in the United States. Accordingly, I conclude that the threat was unlawful, see *Harper Packing Co.,* 310 NLRB 468, 469 (1993), and I find that the Respondent's action in this respect violates Section 8(a)(1) of the Act, as alleged.

Otherwise, however, an employer is free to hire permanent replacements to continue operations during a strike or work stoppage and it may lawfully refuse to reinstate strikers where it can shown that their jobs are occupied by permanent replacements. An employer also may eliminate striker's jobs for bona fide reasons unrelated to labor relations such as the need to adapt to changes in business conditions or to improve efficiency.

It also is well established by the Supreme Court in *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967), and the Board in *Laidlaw Corp.*, 171 NLRB 1366 (1968), that economic strikers had continued status as employees and entitlement upon request, to be returned to their former job, or a substantially equivalent position absent proof of "legitimate and substantial

business justifications" for an employer's refusal to reinstate the strikers.

Here, although the Respondent had anticipated the probability that some crews would be laid off back in Cincinnati, the record indicated that this did not occur. Although it appears that the Respondent had the right to ask them for their key and to replace them since they were not willing to go to work, it replaced Brinson and Crabtree on the temporary volunteer job in Canada with a crew of existing employees but this did not create a situation that shows that Brinson and Crabtree were replaced on their regular job (which they still would have had if they had not voluntarily taken the temporary Canadian assignment).

It is clear that in accordance with Lewis' instructions to Lacy, Lacy asked Brinson (and Crabtree) for their truck keys when Brinson responded to Foreman Lacy's question about what he was going to do by saying we still needed to talk about the situation (their complaints). Lacy then went one step further and consistent with Lewis' instructions, told them that their action constituted a "quit."

Thereafter, Brinson attempted, as indicated in his letter, to get his regular job back, apparently by asking at the Respondent's Cincinnati facility and by writing to the Respondents chief official. The tenor of Brinson's letter conveys an unconditional offer to return and I find that this letter (if not a possible showing of an earlier unconditional offer to return), triggered an obligation for the Respondent to return Brinson to his regular job. Although it is not established on this record, the same would hold true as to Crabtree if and when he made or makes an unconditional offer to return.

The Respondent cannot unilaterally decree that these employees quit because they engaged in a protected activity and otherwise, there is no showing Brinson and Crabtree were replaced by permanent replacement workers and, accordingly, its failure to accord timely reinstatement violates the employees' rights to reemployment and I find that the Respondent violated Section 8(a)(1) of the Act by considering and characterizing their joint withholding of their services in an attempt to resolve grievances over payments and working conditions to be a "quit" and by failing and refusing to retain or reinstate them in their regular jobs.

It is clear that the sole motivating factor for the Respondent's unilateral conclusion that Brinson and Crabtree "quit" was their concerted action in withholding their services in an attempt to talk about resolving their complaints about working conditions. This conclusion effected the termination of these two employees and was dictated by Supervisor Lewis in Cincinnati, implemented in Canada by Foreman Lacy, and renewed and ratified in the United States by the Respondent and its president when they rejected Brinson's attempt to return to his regular job back in Cincinnati. The working conditions that initialed the employees' concerns related to travel between the United States and Canada and actions that took place in Canada were closely connected parts of a single event that had its origin and conclusion in the United States. The main illegal effect of the Respondent's conduct was not extraterritorial and, as noted above, it in no way interferes with or affects the employment conditions of Canadian employees. I further find that the remedial order recommended here would have no demonstrated extraterritorial effect and I conclude that in accordance with *Coastal Stevedoring,* supra, the Board properly should assert jurisdiction.

The Respondent has show that it had a legitimate right to replace Brinson and Crabtree on the job in Canada, however, there is no showing that the Respondent's Ottawa job, as contrasted with the Quebec power line work, was "emergency" or "at risk" work that would negatively affect the right of employees to withhold their services and it otherwise had not shown that it had the unilateral right to conclude that they "quit" their jobs by withholding their services or to permanently terminated them for their concerted activity. As noted above it has not shown that Brinson and Crabtree were replaced in their regular jobs by permanent replacements.

The Respondent acknowledges that although Brinson and Crabtree were members of the Union for matters affecting their employment with the Employer, the contract's terms were limited to work on Cincinnati Gas and Electric property and the record also shows that the Union, thereafter declined to act on their behalf. The Respondent otherwise fails to cite any Board cases on this issue and I find no basis under these circumstances for concluding that Brinson and Crabtree forfeited the protection of the Act by acting together rather than through the Union.

Under all these circumstances, I conclude that Brinson and Crabtree were terminated from their regular positions because of their protected conduct and that the Respondent has failed to show any persuasive, valid reasons that would legally justify its actions. Accordingly I find that overall record supports a conclusion that the Respondent have violated Section 8(a)(1) of the Act in this regard, as alleged.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. By threatening employee Dennis A. Brinson with layoff because he concertedly complained about working conditions, the Respondent has interfered with, restrained, and coerced employees in the exercise of their rights guaranteed them by Section 7 of the Act, and thereby has engaged in an unfair labor practice in violation of Section 8(a)(1) of the Act.
3. By discharging Dennis A. Brinson and Eric Crabtree because they collectively complained about working conditions and withheld their services, Respondent engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.
4. The conduct that was the basis for these illegal actions was part of single events that effectively originated and concluded in the United States, the conduct was not extraterritorial and did not interfere with or affect the employment conditions of Canadian employees and it is appropriate for the Board to assert jurisdiction.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

With respect to the necessary affirmative action, it is recommended that Respondent be ordered to immediately reinstate Dennis A. Brinson and Erik Crabtree to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, discharging if necessary all employees hired to replace them.

It also is recommended that the Respondent be ordered to make whole these employees for any loss of earnings they may have suffered by reason of the Respondent's refusal to retain or reinstate them after their return from Canada. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950). Interest shall be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[3] Otherwise, it is not considered necessary that a broad order be issued.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Asplundh Tree Expert Compcny, Cincinnati, Ohio, its officers, agents, successor,s and assigns, shall

1. Cease and desist from

(a) Interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act by threatening employees with layoff because they concertedly complained about working conditions.

(b) Terminating any employee for engaging in concerted activities protected by Section 7 of the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Dennis A. Brinson and Erik Crabtree immediate and full reinstatement and make them whole for all losses they incurred as a result of the discrimination against them, in the manner specified in the remedy section.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful terminations of these employees and within 3 days thereafter notify them in writing that this has been done and that the discharges will not be used against them in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days of service by the Region, post at its Cincinnati, Ohio facilities, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT interfere with, restrain, or coerce its employees in the exercise of the rights guaranteed them by Section 7 of the Act by threatening employees with layoff because they concertedly complained about working conditions.

WE WILL NOT terminate any employee for engaging in concerted activities protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interferes with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Dennis A. Brinson and Erik Crabtree immediate and full reinstatement and make them whole for all losses they incurred as a result of the discrimination against them.

WE WILL, 14 days from the date of this Order, remove from our files any reference to the unlawful terminations of these employees and within 3 days thereafter notify them in writing

[3] Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice "Posted by Order of the National Labor Relations Board'' shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

that this has been done and that the discharges will not be used against them in any way.

ASPLUNDH TREE EXPERT COMPANY